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No.

In The
Supreme Court of the United States
October Term, 1993

PETER BRANTON,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a radio listener who lodges a complaint with the Federal Communications Commission alleging a violation of the FCC's broadcast indecency policy have standing to seek appellate review of the agency's denial of the complaint?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Peter Branton, the respondents Federal Communications Commission and United States of America, and intervenors National Public Radio, Public Broadcasting Service, Media Access Project, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, People for the American Way, and Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights.

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PETITION FOR WRIT OF CERTIORARI

Peter Branton petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment in *Peter Branton v. Federal Communications Commission*, 993 F.2d 907 (D.C. Cir. 1993) declining to review Mr. Branton's appeal of an FCC ruling on his complaint of violations of the FCC's broadcast indecency rules.

OPINIONS BELOW

The *Opinion* of the court of appeals is reported at 993 F.2d 907 (D.C. Cir. 1993) and is reproduced in the Appendix (App.) at 1a. The FCC's *Letter Ruling* is pub-

lished at 6 FCC Rcd. 610 (1991) and is reproduced in the Appendix at 15a.

JURISDICTION

The *Opinion* (App. at 1a) and *Judgment* (App. at 12a) of the court of appeals were entered on June 1, 1993, as was an order withholding issuance of the mandate pending any timely petition for rehearing or suggestion for rehearing *en banc*. Orders denying a petition for rehearing and a suggestion for rehearing *en banc* were entered September 30, 1992 (App. at 13a, 14a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 1464. Broadcasting obscene language

Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

STATEMENT OF THE CASE

Since 1927, Congress has prohibited the broadcast of "any obscene, indecent, or profane language." Radio Act of 1927 § 29, 44 Stat. 1172 (1927), *codified* at 18 U.S.C. § 1464. The Communications Act of 1934, as amended, empowers the Federal Communications Commission to impose administrative sanctions for violations of Section 1464, including issuing warnings, imposing fines and revoking licenses. 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D). The principal means by which the FCC becomes aware of violations of Section 1464 is the filing of complaints from radio listeners or television viewers, which are reviewed by the Enforcement Division of the FCC's Mass Media Bureau.

In February, 1989, Petitioner Peter Branton lodged a complaint with the FCC in response to a news story he heard at 6:25 p.m. over the National Public Radio program "All Things Considered."[1] The segment, which was part of a story about organized crime, included the broadcast of a wiretap of a telephone conversation in which reputed mobster John Gotti repeatedly used variations of the word "f___." The word occurred ten times in the 110-word excerpt. NPR made no attempt to mask the words in its report. It warned its listeners only that "the following story contains some very rough language" and that "Gotti's threats are extremely profane." *Letter Ruling*, 6 FCC Rcd. at 610, App. at 17a.

The FCC's Mass Media Bureau concluded that the NPR broadcast did not violate Section 1464 or the FCC's indecency standards,[2] and the full Commission, over one dissent, denied reconsideration. The Commission acknowledged that the "repetitious use of coarse words" was "objectionable to many persons," but it concluded that such words were not "gratuitous, pandering, titillating and otherwise 'patently offensive'" when used in a "legitimate news report." *Letter Ruling*, 6 FCC Rcd. at 610, App. at 16a. Commissioner Duggan dissented. He found that NPR's broadcast was "patently offensive to civilized and cultivated people," and that the Commission's ruling represented a change in FCC policy: "Although the Commission has twice declined to adopt an express 'news exemption' for indecency enforcement, it may have implicitly created such an exemption here." *Id.* at 611, App. at 21a.

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[1] Mr. Branton heard the broadcast over radio station WSMC-FM, located in suburban Chattanooga, Tennessee.

[2] The FCC defines "indecent programming" as "programming 'that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.'" *Letter Ruling* at 610 (citations omitted), App. at 15a.

Mr. Branton appealed the Commission's decision to the court of appeals on the ground that the decision was an unexplained departure from the FCC's prior, announced indecency policy and was, accordingly, arbitrary and capricious. Following oral argument, the court of appeals requested supplemental briefing on the question whether the Commission's decision was unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985).

The court of appeals ultimately held that it could not reach the question briefed by the parties because Mr. Branton did not have standing to challenge the Commission's decision, a ground no party had urged upon the court. 993 F.2d 907 (D.C. Cir. 1993), App. at 2a.[3] While the court acknowledged that "an offense to one's sensibilities may indeed constitute an injury," and that Mr. Branton had suffered "a discrete, past injury," the court held that he had not suffered an injury-in-fact because he sought "neither damages nor other relief," but only "the imposition of a sanction in the hope of influencing another's future behavior." *Id.* at 909, App. at 4a. According to the court, Mr. Branton's complaint of an "isolated indecency broadcast" was insufficiently immediate, although Mr. Branton "might be in a better position" if he could allege that programming "repeatedly violated the indecency standard." *Id.* at 910, App. at 6a. Relying on *Los Angeles v. Lyons*, 461 U.S. 95 (1983), the court held that it was "mere conjecture that a radio station will again broadcast, at a time when the petitioner is listening, indecencies that would be proscribed under 18 U.S.C. § 1464." *Id.* at 909, App. at 5a-6a.

The court also held that Mr. Branton failed to demonstrate that his complaint could be redressed by favorable FCC action. It was "conjectural" whether FCC sanc-

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[3] After the parties filed supplemental briefs in response to the court's initial concern as to the relevance of *Heckler v. Chaney*, the court did not pursue that line of thought any further. The *Opinion* makes no reference to the *Chaney* case.

tions "would cause any radio station(s) in the area to broadcast any fewer indecent programs in the future." *Id.* at 911, App. at 9a. The court reasoned that even if the FCC imposed a fine on a radio station, the station might decide that "the benefits of broadcasting indecent language ... outweigh the costs of [paying fines] to the Government." *Ibid.* Since the court did not know "the elasticity of demand for broadcast indecency," it had "no confidence" that its "reversal of the agency's decision would serve at all to protect the petitioner from future exposure to broadcast indecency." *Id.* at 911, 912, App. at 10a.

Intervenors People for the American Way and Washington Area Citizens Coalition Interested in Viewers Constitutional Rights, groups which had intervened in support of the FCC's decision, petitioned for panel rehearing and rehearing *en banc* on the grounds *inter alia* that the court had wrongly decided the question of standing. The FCC agreed: In response to the rehearing petition the FCC advised the court that it had "erred in its conclusion that petitioner lacked standing" and that the panel's decision was "inconsistent with the approach to viewer/listener standing that this Court and the FCC have followed." *FCC Response to Petition for Rehearing* at 1, 2. "[N]o court has even suggested ... that the immediacy element of constitutional standing analysis, as applied to a viewer/listener's challenge to FCC rejection of an argument related to broadcast programming, required anything more than that the viewer/listener reside within the service area of the station at issue." *Id.* at 3 (footnote omitted). The Commission further told the court that, with respect to causation and redressability, it was a "fundamental assumption underlying the FCC's enforcement of Section 1464 ... that such enforcement will deter future violations." *Id.* at 7.

The court of appeals denied the petition for rehearing and suggestion for rehearing *en banc*. Three judges voted to rehear the case *en banc*. App. at 13a.

REASONS FOR GRANTING THE WRIT

This case presents an issue of indisputable consequence to the public interest: Whether a radio listener or television viewer, having filed a complaint with the FCC which results in a published adverse ruling, has standing as a "representative[] of the public interest" (*Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942)) to seek review in the court of appeals. This is an issue that, until the decision of the lower court, had been resolved uniformly in favor of listener standing. As the Seventh Circuit has stated, "listener standing is not unusual," in fact "'[t]he legality of listener standing is so well accepted that the point is never raised in the present FCC litigation.... *[L]isteners have been implicitly granted standing to challenge just about every form of FCC program regulation or of licensee programming activity.*'" *Maier v. FCC*, 735 F.2d 220, 228-29 (7th Cir. 1984) (emphasis in original) (quoting *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 411 n.17 (D.C. Cir. 1975) (separate statement of Bazelon, C.J.)). *See also, In Re Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, 98 (1982) ("*Standards for Determining Standing*") ("The legality of listener standing is so well-accepted [that] we have often discussed the issue in rather summary fashion").

The judgment of the court of appeals below is inconsistent with the reasoning of every court of appeals which has considered the question of listener standing since the D.C. Circuit's seminal decision in *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). It is also inconsistent with the stated position of the Federal Communications Commission, which advised the court of appeals in the proceeding below:

> The panel's reasoning in this case -- that there was no cognizable or redressable injury -- appears inconsistent with the approach to

> viewer/listener standing that this Court and the FCC have followed since this Court's decision in [*United Church of Christ*]. To our knowledge, prior to this decision, no one has argued -- and no court has even suggested -- that the 'immediacy' element of constitutional standing analysis, as applied to a viewer/listener's challenge to FCC rejection of an argument related to broadcast programming, required anything more than that the viewer/listener reside within the service area of the station at issue.

FCC Response to Petition for Rehearing at 2-3 (footnote omitted).

The decision of the court of appeals eviscerates the ability of listeners to seek prompt enforcement of FCC rules. By finding that Article III restricts the power of listeners to challenge the actions of broadcasters, the court significantly limits opportunities for listeners "individually, in small groups or en masse" to provide their "fresh and vital perspective" or "bring to light information about a licensee's performance that [the FCC would] not have or might otherwise overlook." *Standards for Determining Standing*, 82 FCC 2d at 99-100.

Review by this Court is required to resolve this newly unsettled area of the law of Article III standing.

1. The standards governing standing to appeal agency action are not in dispute. In order to satisfy Article III, a complainant must allege a personal injury that is fairly traceable to the defendant's allegedly unlawful conduct and is likely to be redressed by the relief requested. *Lujan v. Defenders of Wildlife*, 504 U.S. ___, 112 S.Ct. 2130, 2135 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984). A party possessed of standing to appeal agency action must demonstrate that the agency's order caused injury-in-fact and that

the injury is within the zone of interest protected by the agency. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). The APA's judicial review provision, 5 U.S.C. § 702, is "generous" and "should be construed 'not grudgingly but as serving a broadly remedial purpose.'" *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395 (1987) (citations omitted).

Once a party is found to be "aggrieved" (5 U.S.C. § 702), "[a] separate indication of Congressional intent to make agency action reviewable under the APA is not necessary." Rather, judicial review is available "absent some clear and convincing evidence of legislative intent to preclude review." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 231 n.4 (1986). Accordingly, "[t]he essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.[]" *Clarke*, 479 U.S. at 399 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984)). In addition to the broad review permitted under the APA, this Court has recognized that Section 402 of the Communications Act, 47 U.S.C. § 402, "is an example of a statute granting an explicit right of review to all persons adversely affected or aggrieved by particular [FCC] actions." *Clarke*, 479 U.S. at 394 n.8.

a. The court of appeals erred in finding that listeners such as Mr. Branton suffer no cognizable injury-in-fact when broadcasters violate indecency prohibitions established by Congress. The D.C. Circuit previously has stated that there is "no reason to believe ... that Congress ... had any thought that electrical interference and economic injury were to be the exclusive grounds for standing or that it intended to limit participation of the listening public to writing letters to the Complaints Division of the Commission." *United Church of Christ*, 359 F.2d at 1001.

That an offense to a listener's sensibilities constitutes the requisite "injury" was a critical assumption in this

Court's ruling in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978), the principal Supreme Court decision construing 18 U.S.C. § 1464. Indeed, *Pacifica Foundation* arose from the same circumstances as Mr. Branton's complaint, when "a man, who stated that he had heard the [challenged] broadcast while driving with his young son, wrote a letter complaining to the Commission." 438 U.S. at 730.

The logic underlying listener standing has been articulated by the courts time and time again, its core notion being the potentially intrusive nature of the broadcast medium. Because of the "uniquely pervasive presence in the lives of all Americans" (*id.* at 748) which broadcasters command, it is "the right of viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). This is particularly true for programming limitations such as 18 U.S.C. § 1464. "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica Foundation*, 438 U.S. at 738.[4]

With condign respect for the power of broadcasting to "intrude on the privacy of the home without prior warning as to program content," *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (citing *Ginsburg v. New York*, 458 U.S. 747, 756-57 (1982)), no court has questioned the validity of a broadcast indecency challenge by a listener on the ground that a cognizable "injury" was absent. The contrary position of the court of appeals implies, cynically, that a concerned

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[4] We recognize that agency standing and Article III standing need not be governed by the same test. The federal courts, however, have treated standing before the FCC and Article III standing identically. *See American Civil Liberties Union v. FCC*, 523 F.2d 1344, 1347 (9th Cir. 1975); *United Church of Christ*, 359 F.2d at 1000 n.8. The FCC also applies the Article III analysis. *Standards for Determining Standing*, 82 FCC 2d at 95-96.

listener "may avoid further offense by turning off the radio" -- a solution this Court has deemed as unpersuasive as "saying that the remedy for an assault is to run away after the first blow." *Pacifica Foundation*, 438 U.S. at 748-49.

b. The concept of listener standing to appeal FCC decisions -- arising from the courts' continual discernment of an injury-in-fact -- is well established. In *United Church of Christ*, the D.C. Circuit considered at length the question of listener standing to challenge the renewal of a broadcast license. The court held that listeners were "affected" or "aggrieved" parties within the meaning of 47 U.S.C. § 402(b), 359 F.2d at 1003; *see also American Legal Foundation v. FCC*, 808 F.2d 84, 88-91 (D.C. Cir. 1987).[5] The court, likening listeners to consumers in regulated industries, stated: "[t]here is nothing unusual or novel in granting the consuming public standing to challenge administrative actions." 359 F.2d at 1002. The court concluded that "unless the listeners -- the broadcast consumers -- can be heard, there may be no one to bring programming deficien-

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[5] While the appeal in this case was predicated upon 42 U.S.C. § 402(a) rather than Section 402(b), the difference has relevance only with respect to where the appeal may be brought -- it has no bearing on the question of standing. *Compare* 47 U.S.C. § 402(b)(6) ("any other person ... aggrieved" may seek review of certain Commission actions in the D.C. Circuit) *with* 28 U.S.C. § 2344 ("[a]ny party aggrieved" may seek review of agency actions in a court wherein venue lies). As this Court noted in *Scripps-Howard Radio*, "the two sections route appeals to different courts," a "differentiation ... in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform.... Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commissioners' order arose out of a proceeding not instituted by the licensee." 316 U.S. at 15-16 (footnote omitted). Relying on this statement, the Seventh Circuit concluded that there was "no reason to believe that the difference between the two sections relates to the issue of standing." *Maier v. FCC*, 735 F.2d 220, 228 (7th Cir. 1984). *See also American Civil Liberties Union v. FCC*, 523 F.2d 1344, 1346 (9th Cir. 1975) (finding listeners had standing in appeal brought under Section 402(a)).

cies or offensive overcommercialization to the attention of the Commission in an effective manner.... [T]hose 'consumers' willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the only ones 'having a sufficient interest' to challenge a renewal application." *Id.* at 1004-05.

Since *United Church of Christ*, the courts of appeals have held that listeners have standing to bring broadcaster or programming-related actions in a variety of contexts. For example, in *Llerandi v. FCC*, 863 F.2d 79 (D.C. Cir. 1988), the D.C. Circuit held that listeners had standing under the FCC's duopoly rules to challenge the assignment of two radio licenses. The court found that the purpose of the duopoly rules was "to assure (or at least enhance) diversification of viewpoints within the broadcast industry.... Listeners are, by definition, 'injured' when licenses are issued in contravention of the policies undergirding the duopoly rule." *Id.* at 85.

In *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984), the court held that listeners had standing to appeal the FCC's refusal to act on alleged violations of the fairness doctrine. The Seventh Circuit found that the fairness doctrine was "at the core of the 'public interest' standard in broadcast communications." Private parties may seek judicial review of the FCC's actions as "representatives of the listening public." *Id.* at 229. "[A] direct, concrete, particularized injury" -- separate and apart from residing in the listening area -- "is unnecessary for a party to have standing as a representative of the public interest." *Ibid.* The court further noted that "[j]ust as the Commission must rely on private persons or groups to represent the public interest in its regulation of broadcasters under the fairness doctrine, reviewing courts must rely on these same private parties in our supervision of the Commission's regulation." *Ibid.* Likewise, the Ninth Circuit held in *American Civil Liberties Union v. FCC*, 523 F.2d 1344, that the ACLU had standing as a representative

of consumers to challenge cable television regulations. *Id.* at 1346-48.

Particularly relevant to Petitioner's claim is *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975). In that case, listeners filed a complaint with the FCC concerning the candid nature of sexual topics on a daytime call-in radio program. The Commission issued sanctions against the broadcaster for violation of the statute at issue in Mr. Branton's complaint, 18 U.S.C. § 1464. When the broadcaster declined to seek further review for financial reasons, the Illinois Citizens Committee for Broadcasting and the Illinois Civil Liberties Union sought review of the order as representatives of the listening public. The court recognized their standing: "representatives of the public have a role in FCC proceedings concerning obscenity determinations -- as is indicated by our recognition that they have standing to challenge the substantive grounds of Commission action even where the licensee is willing to pay the forfeiture and thus acquiesces in the Commission's determination." 515 F.2d at 406. *See also id.* at 402; *id.* at 410-13 (statement of Bazelon, C.J., on denial of rehearing *en banc*).

c. These decisions are wholly consistent with established principles concerning injury-in-fact in the administrative agency context. Broadcasters stand as "proxies for the entire community" (*Red Lion*, 395 U.S. at 394) and may obtain and keep a broadcast license only if the FCC finds that the "public interest, convenience, and necessity" will thereby be served. 47 U.S.C. § 309(a).

Listeners have standing in this context for the same reasons that consumers have standing to challenge regulatory decisions of public utilities. *See United Church of Christ*, 359 F.2d at 1002. As Judge Posner has noted, "[t]he FCC was modeled on public utility and common carrier regulatory agencies, which are umpires between consumer and supplier interest; and typically any disappointed party to a public utility or common carrier proceeding can get

judicial review of the agency's action." *Maier*, 735 F.2d at 238 (Posner, J., dissenting). An injury suffered through a violation of an FCC rule is "analogous to that of a customer who is overcharged." *Id.* at 236. *See ICC v. Virginia-Washington Railroad and Navigation Co.*, 288 U.S. 14, 25-26 (1933); *Associated Industries v. Ickes*, 134 F.2d 694, 699-706 (2d Cir.), *dismissed as moot*, 320 U.S. 707 (1943).

d. The court of appeals in this case addressed none of these principles and ignored the field of case law surrounding this issue. In fact, the only listener standing case even cited by the court of appeals was *United Church of Christ*, which it dismissed as limited to the context of license renewals (*see* 993 F.2d at 909-10, App. at 6a) -- a position flatly inconsistent with the cases that followed it. *See infra* pp. 10-12.

Indeed, upon brief reflection, it is clear that *United Church of Christ* could not logically be limited to the renewal context. Even the court of appeals apparently would not dispute that a listener such as Mr. Branton could challenge a license renewal on the ground that the broadcaster had violated 18 U.S.C. § 1464. But as the FCC pointed out to the panel, if the probability that Mr. Branton would again be subjected to an indecent broadcast is "too slight" (993 F.2d at 910, App. at 7a) to support his standing to appeal a complaint, then there is no reason to recognize his standing to appeal the renewal of a license, since the probability of his being subjected to an indecent broadcast would be equally slight. Thus, "there does not appear to be any basis for a distinction between the renewal and complaint context for purposes of the 'injury-in-fact' analysis." *FCC Response to Petition for Rehearing* at 6. Moreover, said the Commission, "recognizing standing only in the context of a renewal proceeding would undermine the FCC's policy determination that indecency complaints should be made, and adjudicated by the FCC, at the time of the broadcast rather than reserved for consideration at license renewal time, which occurs only every seven years for radio stations." *Ibid.*

Instead of looking to the listener standing cases, the lower court relied on this Court's decision in *Los Angeles v. Lyons*, 461 U.S. 95 (1983), for its conclusion that "the possibility that [Mr. Branton] will again 'some day' be exposed to a broadcast indecency lacks the imminence required." 993 F.2d at 909, App. at 5a. The FCC advised the court of appeals that its comparison to *Lyons* was "inapt."

> The Supreme Court in *Lyons* had good reason to conclude that law-abiding citizens would not likely encounter an illegal police chokehold in the future. By contrast, it is much more likely that a radio station in Branton's service area, broadcasting 24 hours a day, will at some future date broadcast indecent material at a time when Branton is listening.

FCC Response to Petition for Rehearing at 3 n.1.

The chance that Mr. Lyons "would again be stopped for a traffic violation ... [by a Los Angeles policeman] who would illegally choke him into unconsciousness" (461 U.S. at 105), is a far cry from the likelihood that Mr. Branton will again be subjected to "obscene, indecent, or profane language by means of radio communications" (18 U.S.C. § 1464). *Lyons* is distinguishable from this case because speeding is different from listening to the radio. Automobile drivers ordinarily seek to avoid confrontations with law enforcement officials. Radio listeners, by contrast, *purposefully* tune their radios in search of quality news programming, thus finding themselves, again and again, in circumstances which may subject them to offensive programming. To dismiss the possibility that Mr. Branton's experience may recur as "mere conjecture," "too remote," or "attenuated" (993 F.2d at 909, App. at 5a-6a) simply ignores the pervasiveness of radio and television programming in day-to-day life.

2. The court of appeals also erred in its assessment of the causation/redressability component of the standing analysis in this context. The court concluded that it was "conjectural whether the FCC's proceeding against the alleged broadcast indecency ... would cause any radio station(s) in the petitioner's area to broadcast any fewer indecent programs in the future," (993 F.2d at 911, App. at 9a) and speculated that radio stations might choose to pay the fines rather than change their programming. *Ibid.* Based on the "elasticity of demand for broadcast indecency," opined the court (993 F.2d at 911, App. at 10a), broadcasters might decide simply to pay fines to the Government rather than terminate indecent broadcasts.

a. The lower court's suggestion that broadcasters might intentionally flout Section 1464 on the theory that the "benefits" of indecent programming outweigh the "costs" of an FCC sanction -- in addition to being a strangely cynical statement from a court which historically has characterized broadcast licensees as stewards of the public interest -- reflects the court's inattention to other severe sanctions the FCC may impose. A broadcaster's vital asset -- its *sine qua non* -- is a license to operate which may be put in jeopardy by flagrant violations of the FCC's indecency rules. Congress has specifically instructed the Commission that it "may revoke any station license ... for violation of section ... 1464 of Title 18." 47 U.S.C. § 312(a)(6). Hence, the FCC reminded the court that "a forfeiture is [not] the only potential cost of a licensee's decision to broadcast material that it knows to be indecent. A licensee that makes such a decision ... also risks the loss of its license." *FCC Response to Petition for Rehearing* at 7 (citing 47 U.S.C. § 312(a)(6)). Alternatively, the Commission may issue a cease and desist order for a broadcaster's failure to observe Section 1464 (47 U.S.C. § 312(b)); or the agency may deny renewal of a license or grant merely a short term renewal. 47 U.S.C. §§ 307, 308. *See Pacifica Foundation*, 438 U.S. at 730 n.1.

These are avenues of recourse which undeniably redress indecency rule violations. As National Public Radio told the court of appeals, "In view of these potentially dire consequences of broadcasting material that the FCC may deem to be 'indecent,' no rational broadcaster can afford to make its programming judgments based on the sort of simplistic 'cost-benefit analyses' suggested by the [court]." *National Public Radio Response to Suggestion for Rehearing En Banc* at 2.

b. Even when the Commission grants an indecency complaint without imposing formal sanctions, such an action has serious and immediate consequences for a broadcaster. The order may be placed in the station's file and, if subsequent complaints are received, considered with those complaints for their aggregate effect. *See Pacifica Foundation*, 438 U.S. at 730. *See also id.* at 736 (FCC may take note of past program content when considering a license renewal), 737 (Commission may cancel the license of a broadcaster who "persists in a course of improper programming"). In *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976), the D.C. Circuit held that a broadcaster whose initial forfeiture was rescinded by the FCC nevertheless had standing to appeal the issuance of a letter warning the broadcaster of the consequences of future non-compliance. The court explained its view of the effect of such FCC action:

> [T]his letter ... has a concrete effect on this particular licensee.... The letter clearly indicates the Commission's belief that the station's actions *in this case* already constituted a violation, even if not a violation so flagrant as to merit a monetary penalty. If the Commission's order stands, this infraction becomes a permanent part of the station's record. This in all likelihood means that future violations by this station would stand

> to suffer harsher treatment than similar violations by other stations.

Id. at 1006 (emphasis in original; footnote omitted). *See also Maier*, 735 F.2d at 235 (Posner, J., dissenting).

Finally, even if the lower court's basic premise were sound (that an offending broadcaster's liability is limited to monetary forfeitures), the court misapprehended the causal effect that substantial fines have on a broadcaster's conduct. In today's climate, most broadcasters have limited resources. Thus, contrary to the court of appeals' sense of the matter, repeated rule violations met with repeated forfeitures are indeed likely to force a broadcaster either to cease its indecent broadcasts or to cease broadcasting altogether. In either case, it is hardly "conjectural" (993 F.2d at 911, App. at 9a) whether the forfeiture will bring about its desired effect.

In short, the court of appeals' conclusion that Mr. Branton's complaint lacks redressability ignores the range of sanctions available to the FCC. The assertion that broadcasters may ignore the Commission with impunity -- depending upon the "elasticity of demand for broadcast indecency" -- is contradicted by actual practice. Broadcasters who ignore Commission rulings do so at their peril.

The policy behind the court's decision serves neither the public interest, the FCC's regulatory responsibility, nor the broadcaster. A complaint unresolved until a license renewal proceeding may, because of the passage of time, be stale or unverifiable. A broadcaster, lacking an immediate adjudication of a complaint, may unwittingly continue to broadcast programming ultimately determined to be indecent or censor itself until license renewal time out of simple ignorance as to whether certain programming violates Section 1464. The broadcaster gets no intermediate relief, no warning, and no opportunity to conform its broadcasts to the FCC's rules except in a proceeding to grant or deny its

license renewal. That result is patently contrary to the procedure established by Congress -- a procedure which, until the decision at bar, had been well understood by the FCC and every court that had considered it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner,
Peter Branton

December 29, 1993

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 9, 1992 Decided June 1, 1993

No. 91-1115

PETER BRANTON, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., INTERVENORS

Petition for Review of an Order of the Federal Communications Commission

---

Ronald D. Maines for petitioner.

James M. Carr, Counsel, Federal Communications Commission ("FCC"), with whom *Robert L. Pettit*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, *Jane E. Mago*, Assistant General Counsel, FCC, and *Catherine G. O'Sullivan* and *James W. Lowe*, Attorneys, U.S. Department of Justice, were on the brief, for respondents. *Sue Ann Kanter*, Counsel, FCC, entered an appearance for respondents.

Timothy B. Dyk, with whom *Barbara McDowell*, *Theodore E. Miles*, and *Karen K. Christensen* (for National

Public Radio), *Paula A. Jameson* and *Nancy H. Hendry* (for Public Broadcasting Service), *J. Laurent Scharff* (for Radio-Television News Directors Association), and *Jane E. Kirtley* (for The Reporters Committee for Freedom of the Press) were on the brief, for intervenors National Public Radio, *et al.*

Elliot M. Mincberg, Walter A. Smith, Jr., and *Andrew Jay Schwartzman* were on the brief for intervenors People for the American Way and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights.

Before BUCKLEY, WILLIAMS, and D.H. GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: This is a petition for review of a letter ruling of the Federal Communications Commission refusing to take action against National Public Radio for allegedly broadcasting "obscene, indecent, or profane" language in violation of 18 U.S.C. § 1464. We hold that the petitioner lacks standing under Article III of the Constitution to challenge the FCC's decision.

I. BACKGROUND

In the early evening of February 28, 1989, NPR's news show "All Things Considered" ran a report on the trial of John Gotti, the alleged leader of an organized crime syndicate in New York. The report featured a tape recording of a wiretapped phone conversation between Gotti and an associate. In the 110-word passage that NPR excerpted from the tape recording for broadcast, Gotti used variations of "the f---- word" ten times. He used it to modify virtually every noun and in one instance even a verb ("I'll f---ing kill you"). NPR made no effort, such as substituting bleeps for any or all of these references, to render the passage less offensive to persons of ordinary sensibility.

Peter Branton, who heard the broadcast and was offended, filed a complaint with the Mass Media Bureau of the FCC. The Bureau concluded that the broadcast material in question was "not actionably indecent" and did not provide "the necessary legal basis for further Commission action" pursuant to 18 U.S.C. § 1464. Mr. Branton then wrote to the Commission asking how he could appeal the Bureau's decision. The Commission treated his letter as an Application for Review and, in a brief letter ruling (over one dissent), affirmed the Bureau's decision. The Commission explained that the Gotti tape was part of a "bona fide" news story; indeed, it had been introduced as evidence in the criminal trial that was the subject of that story. The Commission also noted its long-standing reluctance "to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners." Letter Ruling, 6 FCC Rcd. 610 (1991).

Mr. Branton now petitions for judicial review of the agency's decision not to proceed against NPR.

II. ANALYSIS

Article III of the Constitution of the United States limits the scope of the federal judicial power to the resolution of "cases" or "controversies." In order to implement that limitation, the Supreme Court has developed a doctrine of standing that, along with the other requirements for justiciability, assures that the federal judicial power is exercised only in "those disputes which confine federal courts to a role consistent with a system of separate powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 97 (1968). Because of "the scope and consequence of the review with which the judiciary is entrusted over executive and legislative action," the federal courts must "observe these bounds fastidiously." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

In order to establish standing under Article III, a complainant must allege (1) a personal injury-in-fact that is (2) "fairly traceable" to the defendant's conduct and (3) redressable by the relief requested. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The alleged injury must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), not "conjectural" or "hypothetical," *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Application of these familiar principles leads us to conclude that the petitioner lacks standing to seek review of the FCC no-action letter at issue here.

A. *Injury-in-fact*

In order to challenge official conduct one must show that one "has sustained or is immediately in danger of sustaining some direct injury" in fact as a result of that conduct. *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). This component of the standing doctrine serves both "to assure that concrete adversariness which sharpens the presentation of issues," *Baker v. Carr*, 369 U.S. 186, 204 (1962), and to prevent the federal courts from becoming "continuing monitors of the wisdom and soundness of Executive action...." *Allen v. Wright*, 468 U.S. at 790 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

The petitioner in this case alleges that he was injured because he was subjected to indecent language over the airwaves. While an offense to one's sensibilities may indeed constitute an injury, *see FCC v. Pacifica*, 438 U.S. 726, 748-49 (1978), a discrete, past injury cannot establish the standing of a complainant, such as Branton, who seeks neither damages nor other relief for that harm, but instead requests the imposition of a sanction in the hope of influencing another's future behavior. "[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make a case or controversy." *Lyons*, 461 U.S. at 103. *See also O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or

controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects").

If the petitioner suffers any continuing injury, we suppose it is in the nature of the increased probability that, should the NPR broadcast go unsanctioned, he will be exposed in the future to similar indecencies over the airwaves. Under established Supreme Court precedent, however, this marginal increase in the possibility of a future harm does not meet the "immediacy" requirement for Article III standing.

For example, in *Los angeles v. Lyons*, 461 U.S. at 95, the Court held that a person injured when a policeman subjected him to a chokehold did not have standing to seek an injunction prohibiting the police department from using that maneuver in the future. The Court reasoned that the plaintiff's single experience with a chokehold did not establish "a real and immediate threat that he would again be stopped for a traffic violation, or any other violation, by an officer or officers who would illegally choke him...." *Id*. at 105. *See also Rizzo v. Goode*, 423 U.S. 362, 372 (1976) (plaintiffs lack standing to seek injunction against future police misconduct because threat of repeat injury is too "attenuated"); *O'Shea*, 414 U.S. at 495-96. Similarly, in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), the Court held that an environmental group lacks standing to challenge policies that will allegedly result in the extinction of endangered species if the group cannot establish that its members will visit the habitat of those species in the near future. *Id*. at 2138 ("'some day' intentions [to travel] -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the 'actual or imminent' injury that our cases require") (emphasis in original).

In the present case, the possibility that the petitioner will again "some day" be exposed to a broadcast indecency lacks the imminence required under *Lyons, Rizzo*, and *Defenders of Wildlife*. It is mere conjecture that a radio station will again broadcast, at a time when the petitioner is listening,

indecencies that would be proscribed under 18 U.S.C. § 1464 (as he would have us interpret that statute). While there is, of course, some chance that somewhere, at some time, the petitioner may again be exposed to a broadcast indecency as a result of the Commission's decision, that possibility seems to us far too remote and attenuated to establish a case or controversy under Article III.

Nothing in *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966) (*UCC*), is to the contrary. In that case, we held that "responsible and representative groups" in a broadcaster's listening area have standing to challenge the broadcaster's application for a renewal license. The appellants there alleged that a TV licensee had failed to "give a fair and balanced presentation of controversial issues, especially those concerning Negroes," in violation of the Fairness Doctrine and of the licensee's obligation to operate its station in the public interest. *Id.* at 1000 & 998-99. The court explained that "[s]ince the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience." *Id.* 1002.

UCC is not controlling in the present case for two reasons. First, the appellants in *UCC* alleged that the licensee in question was engaged in a continuing pattern of inappropriate and discriminatory broadcasting, which the FCC by renewing its license had in effect extended. In contrast, the appellant in the present case challenges an FCC determination regarding an isolated indecency broadcast at a single moment in the past. He does not allege a continuing course of misconduct, and there is simply too little reason to believe that the harm to him will ever recur. A listener who alleges that a broadcaster has repeatedly violated the indecency standard might be in a better position to argue that he is subject to a continuing harm or at least an increased likelihood of the harm recurring. *But cf. Lyons*, 461 U.S. at 105 (allega-

tion that Los Angeles policy "routinely apply chokeholds" fails to establish prior victim's standing).

Second, in the years since *UCC*, the Supreme Court has repeatedly emphasized the "immediacy" element of the injury-in-fact requirement. *See Defenders of Wildlife*, 112 S. Ct. at 2130 (1992); *Lyons*, 461 U.S. at 96 (1983); *Rizzo*, 432 U.S. at 362 (1976); *O'Shea*, 414 U.S. at 488 (1974). Accordingly, *UCC* must be understood as a creature of the context from which it arose, *viz.* a license renewal proceeding, which is inherently future oriented.

In sum, the petitioner fails to demonstrate that the FCC's decision not to take action against NPR causes him an injury that is sufficiently "immediate" to establish his standing to challenge that decision. The marginal increase in the probability that he will be exposed to indecent language in the future if NPR is not sanctioned is simply too slight to generate a case or controversy proper for resolution by an Article III court.

B. *Causation/Redressability*

Even if the harm to the petitioner here were sufficiently immediate to make out an Article III "injury," he would not be able to show that his injury "fairly can be traced to the challenged action" and would be "redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 38 (1976). Causation and redressability are separate requirements, as is apparent in a case (such as *Allen v. Wright*) where the relief requested goes beyond mere cessation of the official conduct being challenged (there, tax exemption for schools that discriminate on the basis of race) to include additional relief (*viz.* denial of tax exemption to "a considerably broader class of private schools"). 468 U.S. at 747, 753 n.19. The two requirements tend to merge, however, in a case such as this where the requested relief consists solely of the reversal or discontinuation of the

challenged action. *Id.* at 759 n.24; *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 670 (D.C. Cir. 1987).

As an initial matter, it should be remembered that the petitioner in the present case is not himself in any way subject to the FCC decision he seeks to challenge. His probabilistic injury (such as it is) "results from the independent action of some third party not before the court," *i.e.*, NPR or some other broadcaster that may in the future offend him with an indecent broadcast. *Simon*, 426 U.S. at 42. Under these circumstances, it is "substantially more difficult" for him to establish causation and redressability. *Warth v. Seldin*, 422 U.S. at 505.

The Supreme Court is particularly disinclined to find that the causation and redressability requirements are satisfied where a complainant challenges only an Executive Branch decision not to impose costs or penalties upon some third party. For example, in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the Court held that a parent does not have standing to challenge the state's decision not to enforce a child support statute against the other parent of their illegitimate child. The Court reasoned that it was "at best ... only speculative" that the requested relief (prosecuting and jailing the other parent) would result in the payment of support. *Id.* at 618. Similarly, in *Simon*, 426 U.S. at 26, the Court held that a low-income individual does not have standing to challenge an IRS regulation establishing the amount of free medical care that a charitable hospital must provide in order to maintain its tax-exempt status. The Court explained that it was "purely speculative" whether the tax regulation caused such hospitals to provide less service than they would otherwise provide free of charge; it was "equally speculative" whether increasing the amount of free service required for tax exemption would in fact increase the provision of free services, since "[i]t is just as plausible that the hospitals ... would elect to forgo favorable tax treatment to avoid the undetermined financial drain" of providing more free treatment. *Id.* at 42-43.

Finally, in *Allen v. Wright*, 468 U.S. at 737, the Court held that minority group parents of public school children lack standing to challenge the legality of a tax exemption insofar as it benefits private schools that discriminate on the basis of race. The parents claimed that the tax exemption facilitated enrollment of white children in the private schools to the detriment of the parents' interest in access to desegregated public education. The Court noted that "the links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak" to establish standing, *id.* at 759; it was "entirely speculative" whether withdrawal of the tax exemption would lead any school to change its exclusionary policy or cause parents to transfer their children from a private to a public school in sufficient numbers to "have a significant impact on the racial composition of the public schools. *Id.* at 758.

In the present case, it is at least equally conjectural whether the FCC's proceeding against the alleged broadcast indecency of February 28, 1989 would cause any radio station(s) in the petitioner's area to broadcast any fewer indecent programs in the future. As in the cases discussed above, any favorable impact of the official action that the complainant seeks to compel depends utterly upon the actions of "third part[ies] not before the court," *Simon*, 426 U.S. at 42, whose behavior is difficult to predict.

For example, radio stations might well decide that the benefits of broadcasting indecent language of the sort petitioner here challenges outweigh the costs of making certain payments to the Government (here in the form of fines rather than of taxes). Predicting the reaction of "public" radio stations to a monetary fine is particularly difficult because such stations are non-profit entities. *See* Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. Pa. L. Rev. 497, 568-69 (1981) ("the patrons of a nonprofit are generally much less able to look out for themselves than are the shareholders in a business corporation"). In addition, as broadcast journalists, even for-profit broadcasters undoubtedly make program-

ming decisions in part with an eye to non-monetary factors, such as their own conception of journalistic integrity. *See* Radio-Television News Directors Association Code of Ethics (stating members' responsibility, inter alia, "to gather and report information of importance and interest to the public accurately, honestly and impartially" and to "evaluate information solely on its merits as news").

As a result, the court can have no confidence that the FCC's failure to impose a sanction upon NPR will lead it or any other broadcaster to injure the petitioner in the future. Or to put the matter conversely, it is speculative whether our reversal of the agency's decision would serve at all to protect the petitioner from future exposure to broadcast indecency.

This holding (and the Supreme Court precedent upon which it is based) may at first seem inconsistent with the fundamental principle that increasing the price of an activity (*i.e.*, broadcasting indecency) will decrease the quantity of that activity demanded in the market, or in the language of economics, that demand curves are downward sloping. *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 60-61 (12th Ed. 1985); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 5 (4th Ed. 1992). We would hardly undertake to doubt this basic principle, however. *See Smith v. NTSB*, 981 F.2d 1326, 1328 (D.C. Cir. 1993). Rather, our concern is with the magnitude of its effect in this particular case (*i.e.*, with the elasticity of demand for broadcast indecency).

Without some reason to believe that the level of broadcast indecency is significantly affected by the possibility of incurring an FCC sanction, we lack a sufficient basis for the exercise of the federal judicial power. A court is rightly reluctant to enter a judgment which may have no real consequence, depending upon the putative cost-benefit analyses of third parties over whom it has no jurisdiction and about whom it has almost no information.

III. CONCLUSION

This dispute between the petitioner and the FCC falls outside the constitutional domain of the federal courts. The petitioner fails to establish a justiciable case or controversy because his asserted injury is too attenuated and improbable and because this injury neither resulted from the challenged Government decision nor would be remedied by a reversal of that decision. Accordingly, the petition for review is

Dismissed.

United States Court of Appeals
For the District of Columbia Circuit

No. 91-1115 September Term, 1992

Peter Branton,
Petitioner

v.

Federal Communications Commission
and United States of America,
Respondents

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: Buckley, Williams and D. H. Ginsburg, Circuit Judges

J U D G M E N T

This cause came on to be heard on the petition for review of an order of the Federal Communications Commission and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petition for review is dismissed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: June 1, 1993
Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

[Filed June 1, 1993]

United States Court of Appeals
For the District of Columbia Circuit

No. 91-1115 September Term, 1992

Peter Branton,
Petitioner

v.

Federal Communications Commission
and United States of America
Respondents

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Intervenors' Suggestion For Rehearing *En Banc* and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /s/ Linda Jones for
Robert A. Bonner
Deputy Clerk

Chief Judge Mikva and Circuit Judges Wald and Edwards would grant the suggestion.

[Filed September 30, 1993]

United States Court of Appeals
For the District of Columbia Circuit

No. 91-1115 September Term, 1992

Peter Branton,
Petitioner

v.

Federal Communications Commission
and United States of America
Respondents

BEFORE: Buckley, Williams and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of intervenors' petition for rehearing, filed July 16, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Linda Jones for
Robert A. Bonner
Deputy Clerk

[Filed September 30, 1993]

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 24, 1991

Released: January 25, 1991

Mr. Peter Branton
1007 Scenic Highway
Lookout Mountain, TN 37350

8310-HTS
C11-515

Dear Mr. Branton:

This letter concerns your November 17, 1989, Petition for Reconsideration of the Mass Media Bureau's October 26, 1989, dismissal of your complaint against National Public Radio. That request is being treated as an Application for Review pursuant to Section 1.115 of the Commission's Rules, given your expressed desire for eventual full Commission review. Your complaint alleged that a segment about John Gotti, a reputed organized crime figure, broadcast February 8, 1989, at 6:25 p.m. on the National Public Radio program "All Things Considered," was indecent. Specifically, the recording you supplied included, as part of a news segment about organized crime, a wiretap of a telephone conversation in which Gotti repeatedly used variations of the expletive "fuck" (transcript attached). In your Petition, you claim that it is difficult to understand how the language in the broadcast can be considered less than in violation of any standards of "obscene or indecent material." You also state the broadcast contained a preliminary admission that the language is "extremely profane" and note that an "obscene word" was repeated numerous times in the broadcast.

"Indecent programming" is defined as programming "that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual

or excretory activities or organs." *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). When analyzing whether particular material meets this definition, the Commission looks first and foremost to the context in which the language was presented -- a review that encompasses a host of variables, including, among other things, an assessment of whether the language was used in a "shocking" or "vulgar" fashion or was without merit. *Id.* at 932. No terms are *per se* indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency if used in other, less objectionable circumstances. *Id.* at 932 and N.28, *see also* Letter from James C. McKinney to William J. Byrnes (June 5, 1987), *aff'd Memorandum Opinion and Order*, FCC 87-215 (June 16, 1987).

We recognize that the repetitious use of coarse words is objectionable to many persons, and understand that you personally may have been offended by the use of expletives during the Gotti segment. Nonetheless, we do not find the use of such words in a legitimate news report to have been gratuitous, pandering, titillating or otherwise "patently offensive," as that term is used in our indecency definition. In reaching this determination, we note that the program segment, when considered in context, was an integral part of a *bona fide* news story concerning organized crime, and that the material prompting your complaint was evidence used in a widely reported trial. *See Infinity Broadcasting*, 3 FCC Rcd. at n.31. These surrounding circumstances persuade us that the use of expletives during the Gotti segment does not meet our definition of broadcast indecency. In reaching this conclusion, we note that we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners. *See, e.g., Syracuse Peace Council*, 2 FCC Rcd. 5043, 5051 (1987), *recon. denied*, 3 FCC Rcd. 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 107 L. Ed. 2d 737 (1990).

Based on the foregoing, we affirm the Mass Media Bureau's conclusion that the material in question was not indecent. Accordingly, pursuant to Section 1.115 of the Commission's Rules, (47 C.F.R. Section 1.115) your Request for Reconsideration of the October 26, 1989, determination, which the Bureau has referred to the Commission to be treated as an Application for Review, IS DENIED.

This letter was adopted by the Commission on January 24, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

February 8, 1989, 6:25 p.m.
"All Things Considered" #890208 "GOTTI"

MV: Male Voice
MS: Mike Schuster
JG: John Gotti
OV: Other Voice

MV: He is known in New York as the dapper Don and the book published last year labeled him a Mob Star. John Gotti has become the nation's most notorious gangster. In recent years he's been acquitted in two celebrated trials and now he's facing new charges in connection with an attempted killing of a labor official. Through it all, John Gotti has become a familiar face on television and a feared presence on the streets of New York. NPR's Mike Schuster has a report and a warning, the following story contains some very rough language.

*****

MS: This is an excerpt from a wiretap. One conversation Gotti had with an associate some years ago before heading the Gambino family. The tape has been played in court. Gotti is browbeating the associate for not returning his phone calls. The other man claims his wife didn't pass along Gotti's messages. Gotti's threats are extremely profane.

JG: (Unintelligible) fucking (unintelligible) you understand me?

OV: (Unintelligible)

JG: Listen, I called your fucking house five times yesterday. Now if you want (unintelligible) fuck (unintelligible). Now if you want to disregard my fucking phone calls I'll blow you and the fucking house up.

OV: I never disregarded anything.

JG: Are you, call your fucking wife or will you tell her.

OV: All right.

JG: This is not a fucking game I (unintelligible) how to reach me days and nights here, my fucking time is valuable.

OV: I know that.

JG: Now you get your fucking ass (unintelligible) and see me tomorrow.

OV: I'm going to be here all day tomorrow.

JG: Never mind all day tomorrow (unintelligible) if I hear anybody else calling you (unintelligible) I'll fucking kill you.

MS: As head of the Gambino family, Gotti controlled vast crime activities including gambling, loan sharking, labor racketeering and gasoline bootlegging. Author Gene Mustane

says Gotti has worked hard during the past three years to consolidate his control and defend the mob from the onslaught of federal and state prosecutions that the Mafia suffered.

DISSENTING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Application for Review of Bureau's Dismissal of Indecency Complaint Filed Against National Public Radio's "All Things Considered".

Between 1975 and 1987, the Commission took a somewhat limited approach to enforcing its prohibition against indecent broadcasts. It took no action unless the material involved the repeated use, for shock value, of words similar or identical to the so-called "Seven Dirty Words" satirized in George Carlin's "Filthy Words" monologue -- a performance involved in the Supreme Court's *Pacifica* decision. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Four years ago, the Commission found that this standard was unduly narrow. It concluded that the definition of indecent material set forth in *Pacifica* appropriately includes a broader range of material than the seven specific words at issue in that case. As we noted in *Pacifica Foundation, Inc.*, 2 FCC Rcd. 2698, 2699 (1987), "[t]hose particular words are more correctly treated as examples of, rather than a definitive list of the kinds of words that, when used in a patently offensive manner as measured by contemporary community standards applicable for the broadcast medium, constitute indecency." The D.C. Circuit upheld this Commission action, finding that the FCC had "rationally determined that its former policy could yield anomalous, even arbitrary results." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988). In broadening its definition of indecency, however, the Commission never abandoned its earlier standard. The seven dirty words remained a key determination of what the Commission would find unacceptable. The Commission, by

its 1987 clarification, merely expanded the standard to include a wider range of indecent material.

In this case, however, it appears that the Commission is veering away from its former standard. Bending over backwards, perhaps -- because the broadcast in question was by National Public Radio, and because it was a newscast -- the Commission suddenly appears willing to ignore the standard that in the past has guided its decisions on indecency. One stark fact remains, however: the broadcast featured, in the course of a few seconds, ten repetitions of the dirtiest of "the seven dirty words". The word in question is the one expletive that has *traditionally* been considered the most objectionable, the most forbidden, and the most patently offensive to civilized and cultivated people: the famous F-word. That word, in the past -- and especially its deliberate, repeated, gratuitous use -- has almost always been sufficient to justify a ruling of indecency by the FCC.

Can its use in the NPR broadcast now before us be defended as necessary to inform the audience and to establish the character of John Gotti, the man who spoke it? Perhaps. Just one airing of the word, however, would be sufficient to accomplish that purpose. Although I recognize the importance of context to indecency determinations. I consider that the deliberate and repeated use of this word fits precisely the meaning of the word gratuitous: unnecessary and unwarranted. And such deliberate and repeated use, in my judgment, however noble the intent of the broadcaster, seems to me to fit the definition of pandering: catering to low tastes.

In the sensitive and controverted field of indecency enforcement, every Commission decision, however small or close, has precedential value. I am concerned that the Commission's departure here from its unusual standard, though well-intentioned, could open the floodgates to the repeated, gratuitous use of language that has historically and legally been considered indecent or obscene. By such decisions as this, the Commission may unwittingly encourage a plethora of

"newscasts" that purvey patently objectionable material under the cover of journalistic legitimacy. Such a development would not only be a misfortune for our national culture; it would also contravene the intentions of Congress and the courts, who have never suggested that broadcasters be given *carte blanche* to incorporate indecent material into news or public affairs programming.[1] Although the Commission has twice declined to adopt an express "news exemption" for indecency enforcement, it may have implicitly created such an exemption here.

The Supreme Court has held that government can constitutionally regulate indecent broadcasts in the interest of protecting children. I interpret that as including the protection of children form the gratuitous use of patently offensive language even in *bona fide* news stories. And so I dissent, in this case, from the Commission's decision that the broadcast in question was not indecent.

FOOTNOTE FOR STATEMENT

[1] *See Citizen's Complaint Against Pacifica Foundation*, 59 FCC 2d 892 (1976); *Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd. 930, 937 n.31 (1987).